No. 2890

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROLLIE A. YORK and ED. KARR,
Plaintiffs in Error.

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

On Writ of Error to the District Court of the United States for the Southern Division of the Northern District of California, First Division

JOHN W. PRESTON,
United States Attorney.

M. A. THOMAS,
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Attorneys for Defendant in Error.

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STATEMENT OF THE CASE

Counsel for plaintiffs in error has made a long statement of the case which is not accurate and is colored to serve the purposes of his argument. The facts in the case appear to be more complicated than they are, for the reason that a considerable part of the testimony refers to evidence of things found in the basement of a dwelling at 4405 West Street, Oakland, where the defendant, Karr, had lived during the time of the conspiracy. This testimony was introduced for the purpose of showing intent and guilty knowledge, but it is not really

necessary to the case, and has a tendency to confuse the main issues.

The indictment charges that on the first day of January, 1915, at Oakland, in the County of Alameda, in the State and Northern District of California, Rollie A. York and Ed. Karr wilfully, knowingly, unlawfully, wickedly, corruptly and feloniously conspired, combined, confederated and agreed together and with divers other persons whose names are to the Grand Jurors unknown, to wilfully, etc., with intent to defraud, pass, utter, publish and sell certain false, forged and counterfeited coins which as they and each of them at all times in the indictment mentioned, well knew, were false, forged and counterfeit, and in the likeness and similitude of the genuine gold coins of the United States known as and called half eagles or five dollar pieces.

The indictment charges that the conspiracy existed at the time of all the overt acts set forth, and then sets up a number of overt acts as enumerated by counsel for plaintiffs in error in his brief at pages 7, 8 and 9.

The evidence shows that plaintiffs in error were married men, and had been in the employ of the Southern Pacific Company as brakemen and conductors. Karr was discharged from the Southern Pacific on about November 1st, 1912, and York quit about July 22nd, 1913. They both subsequently, while living in Oakland, took an examina-

tion for positions on the Oakland Police Force where they served for about a month when they resigned and went into the jitney business. They pursued the jitney business for a short time and then gave that up, after which York assisted his wife in securing subscriptions for Orchard and Farm, working for a prize. The record shows at pages 251-3 of the Transcript that in May, 1915, York and his wife won $1250 in a lottery. Karr apparently did nothing for a considerable period of time before the trip to Stockton, during which a number of the overt acts were committed.

There is in the record material evidence supporting every one of the overt acts alleged, and the verdict is well supported by the evidence as will appear from a reading thereof. It is a story of two trainmen, one of whom is discharged, and the other of whom resigns in anticipation of being discharged. They do nothing for a while and then get on the police force. This gives them a certain standing in the community and affords them certain immunity from suspicion on account of the unlawful business which they have undertaken. When they have secured the benefit of this by serving a month, they quit and take up the jitney business. This gives them an opportunity to change money and circulate through the community. They soon give this up however, and devote practically all of their time to their illegal occupation and the community is flooded with counterfeit $5 coins.

York at Oakland, is on two occasions proved to have passed or attempted to pass counterfeit $5 coins, as is shown by the testimony of Harry Collinbell and Robert Mulholland. He and Karr finally go to Stockton, York carrying the supply of counterfeits, and Karr doing the actual passing. The counterfeit is so good, and they have been so successful in passing them, that Karr when he has one of them turned down by Robert Eickhoff in one saloon, immediately goes to another saloon and passes the counterfeit $5 coin on Newton Jones.

It will be observed that while in Stockton, the men do not travel together all the time, but each takes a different course, and the two meet occasionally. This is for the purpose of avoiding suspicion in the event the man who does the passing, should be arrested and searched. No counterfeit coins would be found on him except the one he was engaged in passing, nor would an excess amount of silver be found on him for the reason that his partner, York, in this case, carried the surplus silver and the supply of counterfeit coins.

The two men, as is shown by the Transcript, were under suspicion and were being followed after the attempt was made to pass the counterfeit coin on Robert Eickhoff, and according to their statement after they were arrested, as appears at page 40 of the Transcript in the testimony of J. T. McKenzie, they noticed fellows watching them and wanted to get out of the way. It was on this ac-

count, as appears in the testimony of McKenzie at page 39 of the Transcript, that York went into Longers' Saloon and as appears at the middle of page 34 of the Transcript, he went all the way to the back of the saloon to the entrance of the toilet. It was then, after having noticed the fellows watching him, that he got rid of the 27 counterfeit $5 coins which were found by the witness Campbell in the flush box of the toilet in Longers' Saloon.

As evidence of the fact that York carried the silver collected, as well as the stock of counterfeit coins to be passed, it should be noted that when the men were taken to the Station by the Stockton Police and searched, Karr had only $4.80 in silver on his person (Tr. p. 306), while York had $42.80, all in silver (Tr. p. 35). It appears from the testimony of Robert Eickhoff that when Karr attempted to pass the counterfeit $5 coin on him in his Stockton Saloon, and he refused the coin, Karr gave him another $5 coin and took change, Eickhoff taking out the price of a drink of whiskey, (Tr. p. 21) Karr then went immediately to the Rex Bar and passed the counterfeit $5 coin on Newton Jones, and carried away $4.90 in change. (Tr. p. 22.) Karr should therefore, have had when arrested shortly thereafter, almost $10 in silver, and would have had, but for the fact that after leaving Eickhoff's saloon he gave the silver to York so that he would have an excuse for offering the counterfeit $5 coin to Newton Jones.

Another circumstance against the plaintiffs in error is the fact that although Karr offered to make good the counterfeit $5 coin he had passed on Newton Jones—which he stoutly asserted was not counterfeit—by leaving with the Stockton Police $5 for Jones in the event the coin should be found to be bad, he never made any further inquiry about the matter, or called for his $5 which he had left with the Police, either in person or by letter, although according to the testimony, he and York were both for months afterwards, in great need of funds.

I.

THE VERDICT IS SUPPORTED BY THE EVIDENCE AND SHOULD NOT BE DISTURBED.

The alleged fact that the verdict was against the weight of evidence as argued in counsel's opening statement, may not be considered if there was any evidence proper to go to the jury in support of the verdict.

Humes vs. *U. S.* 170 U. S. 210; 42 L. Ed. 1011.

Crumpton vs. *U. S.* 138 U. S. 361; 34 L. Ed. 958.

Moore vs. *U. S.* 150 U. S. 57, 61; 37 L. Ed. 996.

The brief review of the evidence as disclosed in my opening statement, and even in the opening statement of counsel for plaintiffs in error, shows that

there was material evidence to support the charge of conspiracy and each overt act therein contained.

II.

THE TRIAL COURT DID NOT COMPEL THE PLAINTIFF IN ERROR YORK TO TAKE THE STAND, AND NO ERROR WAS THEREFORE COMMITTED.

The remark of the trial court appearing on page 236 of the Transcript, and to which counsel raised no objection at the time, and to which he so strenuously objects now, was at most an observation of the Court with regard to the weight of two kinds of testimony, the one being a self-serving letter not under oath, and the other the testimony of a witness. It is a reference to the testimony of one of the plaintiffs in error, but was not a demand or a request that he should take the stand. It is distinguished from the class of statements sometimes made by prosecuting attorneys, and which are held to be prejudicial because in such statements the jury is asked to draw an inference of guilt from the fact that the defendant did not take the stand.

Furthermore, in the case at bar, counsel for plaintiffs in error immediately stated that plaintiff in error York would take the stand, which he subsequently did, and which in my opinion, counsel always intended he should. The jury therefore, had no op-

portunity to draw any inference, and if defendant York was forced on the stand, his counsel did not discover it until he read the Transcript preparatory to suing out this writ of error.

III.

IF ERROR WAS COMMITTED BY THE COURT IN MAKING THE REMARK WHICH IS THE BASIS OF ASSIGNMENT OF ERROR NUMBER 33 (Tr. p. 385), IT WAS WAIVED BY THE FAILURE OF COUNSEL FOR THE PLAINTIFFS IN ERROR TO OBJECT, REQUEST AN INSTRUCTION TO CURE THE ERROR, AND SAVE AN EXCEPTION TO THE COURT'S RULING THEREON.

The remark of the trial judge that "the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote; it may be self-serving", was made at the time counsel for the plaintiffs in error made a third unsuccessful effort to introduce in evidence a self-serving letter written by the defendant York to his brother in answer to a letter which he had received from his brother concerning the accusation of the Secret Service operatives that plaintff in error York had been engaged in passing counterfeit $5 coins. The facts concerning the letter as disclosed by the record, are as follows:

Government witness Thomas B. Foster, in answer to no particular question on the subject, in relating conversations with the defendant York said:

> "I asked York what he had done with the letter that had been written him by his brother with reference to the cases and he said that he had destroyed it." (Tr. p. 38)

The witness also, as appears on the same page of the Transcript, testified that defendant York did not tell him what the subject matter of the letter was, or any part of it. As appears on page 61 of the Transcript, counsel for plaintiffs in error brought out on cross-examination from the witness Foster. the fact that an answer to the letter had been written by plaintiff in error York to his brother.

Government witness H. M. Moffitt, (Tr. p. 78) in direct examination in relating a conversation he had with defendant Karr, testified as follows:

> "I asked him if Mr. York had received a letter from his brother, and he said he had. I said 'Did you see the letter?' and he said 'Yes.' I asked him what the contents were and he said it was relating to a conversation that I had with his brother in Oakland about October 4th—or at least September 4th.
>
> Q. Did you say anything about whether or not this Stockton case had been taken up by the authorities.
>
> A. Yes.

Q. What did he say in that connection?

A. Well, he said York had written his brother a letter and in reply—

Mr. Woodworth. Q. What is that?

A. He said that York had written his brother a letter in reply to the one he had received, a registered letter I believe * * *"

On cross-examination at pages 83 and 84 of the Transcript, counsel for plaintiffs in error brought out from Mr. Moffitt a conversation which Mr. Moffitt had with plaintiff in error York's brother that he believed plaintiff in error York knew more about these counterfeit coins than he said he knew while in Stockton, and asked plaintiff in error York's brother to communicate with plaintiff in error York, and ask him if he would not give some information that would lead to the clearing up of this matter. The Government witnesses at no place, either in direct or cross-examination, however, testified as to the contents of the letter which plaintiff in error York's brother is supposed to have written to him, and the witnesses Foster and Moffitt both said that they did not know what the brother had written.

Counsel for plaintiffs in error, as the record shows, then attempted to introduce in evidence a letter which the plaintiff in error York had written to his brother in answer to the letter above referred to. The government objected on the ground that the letter was not proper evidence, and was self-serving, which ob-

jection was twice sustained before the incident referred to, when the trial judge made the remark objected to.

Counsel for plaintiffs in error, after he had unsuccessfully attempted to prove by the Government witnesses on cross-examination, the contents of the letter to plaintiff in error York, put O. S. York, the brother of plaintiff in error York, on the stand, and as appears from the Transcript, pages 234 to 237, proved the contents of the letter written to plaintiff in error York. Counsel then again offered the reply to the letter, which offer was rejected and refused by the Court, on the objection of the United States Attorney (Tr. p. 237), on the ground that it was a self-serving declaration by the plaintiff in error in his own interest, and not admissible. It was just prior to this ruling, as appears from the transcript, p. 236, that the following occurred:

"The Court: We are running up against that letter again.

Mr. Woodworth. I know we are.

The Court. My opinion is—it may be an old-fashioned notion—that the testimony of the defendant York here on the stand would be of a great deal more importance than the letter which he wrote; it may be self-serving.

Mr. Woodworth. We will put York on the stand in order to get the record straight."

It should be noted that immediately following the remark by the Court, which is now considered so ob-

jectionable to the plaintiff in error, his counsel stated, "We will put York on the stand in order to get the record straight", and made no objection to the remark, asked for no instruction with regard to it, and took no exception to any action of the Court with regard thereto.

The rule is, "That one who, in a criminal trial, sees his right disregarded, yet does not object, waives it." (Bishop's New Criminal Procedure, Vol. 2, par. 980, sec. 6.)

This doctrine, and the reason therefor, is clearly stated in Bishop's New Criminal Procedure, Vol. 1, paragraphs 118 and 119, as follows:

> Sec. 118. DOCTRINE DEFINED. If, except where some counter doctrine presses with a superior force forbidding, a party has requested or consented to any step taken in the proceedings, or if at the time for him to object thereto he did not, he cannot afterward complain of it, however contrary it was to his constitutional, statutory, or common law rights."
>
> "Sec. 119. NECESSITY—is the chief foundation for this doctrine. Without it, a cause could rarely be kept from miscarrying. The mind, whether of the judge or the counsel, cannot always be held taut like a bow about to send forth the arrow; and if every step in a cause were open to objection as well after verdict or sentence as before, a shrewd practitioner could ordinarily so manage that a judgment against his client might be overthrown. Even by lying by and

watching, if he did nothing to mislead, he would find something amiss, to note and bring forward after the time to correct the error had passed. Should the pleadings be right, and only proper evidence be admitted, some question to a witness would appear in an objectionable form, or the judge would have dropped some word not absolutely square with the books, or omitted some explanation of law to the jury."

The rule is well settled that alleged prejudicial remarks cannot be taken advantage of on appeal or review, unless there is an objection and a request for a correction in proper time.

"Improper remarks in argument by the prosecuting attorney, although prejudicial, do not justify reversal, unless the Court has been requested to instruct the jury to disregard them and has refused to do so."

12 *Cyc.* 585

"Objections to irregularities in the proceedings preliminary to and at the trial, cannot be first made on appeal; this applies to remarks or conduct of the presiding judge prejudicial to the accused, as well as to the remarks and conduct of counsel."

12 *Cyc* 814

See also,

People vs. *Molina,* 126 Cal. 505

People vs. *Shears,* 133 Cal. 154-159

State vs. *Reagan* (Wash.) 36 Pac. 472

State vs. *O'Keefe* (Nev.) 43 Pac. 918

Collins vs. *State* (Tex.) 148 S. W. 1065

Edwards vs. *State* (Tex.) 135 S. W. 540

People vs. *Babcock,* 160 Cal. 537

People vs. *Warr,* 22 Cal. App., 663

This Court has recognized this principle in the case of

Shelp et al vs. *U. S.,* 81 Fed. 694

In that case, the prosecuting attorney in his argument to the jury, made certain statements which were alleged to be prejudicial to the defendant. The Court at page 697, said:

> "It is a sufficient answer to this claim to state that no objection was made to the remarks of counsel at the trial, and no exception taken thereto. If the statement of counsel was improper, exception thereto ought to have been promptly taken. The question whether the remarks of counsel were improper cannot be considered by this court in a case where the point was not raised or exception taken until after the trial. It is undoubtedly within the power of the trial court, with or without objection, to promptly interfere when counsel attempt to influence the jury by a reference to facts not in evidence, or makes any appeal to prejudice the jury dehors the record, or comments upon the character of the defendant when his character has not been put in issue. But the rule is well settled that improper remarks of counsel not made the sub-

ject of an exception will not be considered on appeal."

By readily offering to make the defendant York a witness on his own behalf, counsel did not give the Court an opportunity to cure the error, if error there was, but raised the question for the first time after verdict. This practice should not, and I think will not, be sanctioned by this court.

Cases are cited by counsel at pages 35 and 36 of his brief for the proposition that error will be noticed by a reviewing court, although the question was not properly raised at the trial by objection and exception.

In the Wiborg case, the Supreme Court held that the evidence did not sustain the verdict against two of the defendants, and reversed the judgment against them, although there was no request made at the trial that the jury be instructed to find for them, and consequently no ruling was made or exception taken on that point. But that was an entirely different matter from an irregularity in the trial which may have been cured if counsel had objected rather than agreed to what was done.

In the Crawford case at the bottom of page 35 quoted from by counsel, the question arose upon an objection to a juror made by counsel for the defendant and exception to the Court's adverse ruling thereon. The juror was challenged for cause in that he was a "salaried officer of the United States". The Supreme Court observed that even though he was not

a salaried officer of the United States, which would make him exempt, although not incompetent on that ground alone, yet the examination showed that he was a civil employee of the United States and subject to challenge for cause on account of such relation, in a case where the United States was a party. The Supreme Court said that the general character of the objection was fairly before the trial court, and that it was therefore proper to notice the alleged error.

In *Clyatt against the United States,* 197 U. S. 207, 49 L. Ed. 726 cited by counsel at the bottom of page 36 of his brief, the Supreme Court held that the omission from the bill of exceptions of the technical recital that it contains all the evidence should not deprive the defendant of full consideration of his guilt by preventing a determination by the Supreme Court of the sufficiency of the evidence to sustain the verdict.

These cases, however, do not conflict with the general rule made the law of this court by the case of *Shelp et al* vs. *United States* 81 Fed. 694, above cited.

IV.

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN REFUSING TO ADMIT THE SELF-SERVING LETTER WRITTEN BY PLAINTIFF IN ERROR YORK TO HIS BROTHER, O. S. York.

The testimony of the witnesses Foster and Moffitt was not as to the contents of the letter from O. S.

York to plaintiff in error York, but was as to what plaintiff in error York and Karr respectively said was in the letter. The testimony therefore as to what was said in a conversation between the two defendants and the two officers, is entirely different from the question of what was in the letter or letters mentioned in such conversations. The plaintiffs in error should not be allowed to prove by O. S. York the contents of a letter written by him to plaintiff in error York, and thereby lay the basis of introducing a self-serving letter in answer thereto. Had the Government offered evidence of the contents of the first letter against the plaintiffs in error, the plaintiffs in error could properly introduce the reply, but not otherwise. It should be remembered that the United States Attorney objected from the beginning to the introduction of the contents of these letters. At the bottom of page 61 of the Transcript, it appears that Mr. Preston objected to testimony regarding this first letter. At page 88 of the Transcript he again objected to the admission of the letter from O. S. York to his brother, plaintiff in error York. At page 234 of the Transcript it appears that O. S. York was called not by the government, but by plaintiffs in error, and the matter of his conversation with Mr. Moffitt and the letters was taken up again. The United States Attorney objected again on the ground that this was a collateral matter and had nothing to do with the case. But the Court, as appears on page 235 of the Transcript, overruled his objection by interrupting, and said that the witness O. S. York could

state the contents of the first letter, the letter having been destroyed.

Proof of the contents of this letter was obviously offered, and erroneously admitted over the objection of the prosecuting attorney for the sole purpose of laying the foundation for the introduction of his self-serving letter written in reply. The Government at no place undertook to prove the contents of the first letter, and if the defendants hurt their case by proving it, they should not be, and are not, in the same position they would be in if the Government had offered and proved the contents of the first letter.

The rule quoted by counsel for plaintiffs in error at pages 54 and 55 of his brief from 12 *Cyc.* p. 427, which is the law, is,

> "When statements constituting admissions, are received against defendant, he may prove his self-serving statements in connection therewith by reason of the rule admitting the whole conversation. Thus where the prosecution proves that the witness charged the accused with a crime, the accused has a right to prove that he denied the accusation. But the accused cannot prove in explanation, self-serving declarations contained in *other conversations.*"

This does not mean, however, that because the government brought out conversations between Foster and York and Moffitt and Karr, in which conversations York told Foster that he got a letter from his brother and answered it, and Karr told Moffitt that

York got a letter from his brother and answered it, these two letters are admissible as a part of those conversations. Applying the rule quoted above, the two letters amount to *"other conversations."* The prosecution did not prove, nor undertake to prove, the contents of either. Plaintiffs in error should not have been permitted to prove either. It is where the prosecution puts in evidence an accusatory letter that the defendant can prove the self-serving reply, and that is as far as the cases cited by counsel for plaintiffs in error, go.

The case of *Crawford* vs. *United States,* 212 U. S. 183; 53 L. Ed. 465, cited at the bottom of page 39 of the brief of plaintiffs in error, in giving the reason for the rule, says at the bottom of page 199, (L. Ed. p 472):

> "It is plain that the letter from the witness Aspinwall to the defendant, making the charge that defendant took the letters, as above stated, was put in evidence by the government for the purpose of endeavoring to show that the defendant had surreptitiously taken evidence which might possibly be used against him upon his trial. The response of defendant to such letter should have been admitted as explanatory of the letter of accusation."

If this court should uphold the contention of plaintiffs in error on this point, it would encourage counsel for the accused to get into the record, without disclosing its purpose, an accusation against

the accused to be made the basis of the introduction of volumes of denial. Such practice is not consonant with the reason of the general rule which admits all of the correspondence, if part of it is admitted, nor is it consonant with fair play and good morals.

V.

NO PREJUDICIAL ERROR WAS COMMITTED IN PERMITTING THE JURORS TO EXAMINE THE SQUARE BLOCK OF IRON NOT IN EVIDENCE, AND IF ERROR WAS COMMITTED, IT WAS WAIVED AT THE TIME BY THE FAILURE OF COUNSEL FOR PLAINTIFFS IN ERROR TO MAKE A PROPER OBJECTION AND RESERVE AN EXCEPTION, AND WAS CURED BY THE INSTRUCTION OF THE COURT TO DISREGARD ANY MATTERS WHICH WERE NOT ACTUALLY ADMITTED IN EVIDENCE.

At the outset, counsel for the Government desire to correct a misquotation of the Transcript which appears at pages 78, 79 and 80 of the brief of plaintiffs in error. A reading of page 79 would lead your Honors to believe that the quotation from the Transcript is consecutive, and that nothing is omitted. However, there is a material part of the Transcript omitted immediately following the words "I don't know what" a little below the

middle of page 79 of the brief. The omitted portion as appears by an examination of the Transcript at page 288 et seq., is as follows:

> "Mr. Woodworth. Q. Could you say yourself, Professor, whether or not gold heated to the necessary degree for the purpose of becoming a molten mass placed in here would not stick in this ring?
>
> A. I would not want to qualify as an expert in the casting of gold on metals, having had but little experience with that outside of the casting of bullion.
>
> Mr. Preston. Put your finger upon that stuff and see if you can give us an opinion upon that."

The omission, it should be observed, if not corrected, would lead to two errors—

1st, It would lead the Court to believe that counsel for plaintiffs in error, Mr. Woodworth, did not himself ask any questions of the witness directed to his own purpose, with regard to the square block of iron, and

2nd, It would lead the Court to believe that the objection and exception quoted at the top of page 80 of the brief of plaintiffs in error, were taken to the square block of iron and the testimony concerning it.

The fact is, that counsel did not make any legal objection to the block of iron, nor any questions

regarding it, nor give the Court occasion to make any ruling with regard to any objection thereto, consequently, no exception was taken with regard to the iron or any question asked about it, although as appears from the record, everything said or done with regard to that block of iron was said and done in open court, before counsel for plaintiffs in error, and he himself, as appears at the middle of page 288 of the Transcript, asked a question concerning it in the interest of his clients. The objection, ruling and exception quoted at the top of page 80 of counsel's brief, all referred to another matter, being a little box of lime which, as the record shows, some of the Government's witnesses thought to be plaster of paris, and concerning which no point is made before this Court.

An examination of the square block of iron which is in the record here, will, I think, convince this court that its presence in court and before the jury, did not constitute prejudicial error.

Furthermore, counsel for plaintiffs in error know that the block of iron, box of lime, and various other articles, were offered in evidence immediately after the testimony quoted by him at pages 78, 79, and 80 of his brief, and his objection thereto was sustained as appears at page 474 of the reporter's notes, and which proceeding, was for some reason, left out of the proposed Bill of Exceptions of plaintiffs in error, and escaped the notice of counsel for the defendant in error.

All of these articles should have been admitted in evidence for they had been made the subject of interrogatories equally on behalf of the Government and the plaintiffs in error.

In all of the cases cited by counsel for plaintiffs in error on this point which I have examined, the observations and experiments by the jurors which were held to be prejudicial and grounds for reversal, were made not in open court with all parties present, but in the jury room or on the outside. The trial judge therefore did not have the opportunity of seeing, as he did here, just what was done, nor did the defendant or his counsel have the opportunity of making a proper objection at the time. On that account the trial court in passing on the motion for new trial based on such irregularity, was not in a position to determine whether harm was done or not. Furthermore, when the case came to the reviewing court, the attitude of the defendant and his counsel at the time of the alleged irregularity, was not an element to be considered for the reason that neither was present when the irregularity occurred.

Here we have a different case. A careful reading of the transcript from near the bottom of page 286 to the middle of page 289 discloses that counsel for plaintiffs in error did not make any objection to the square block of iron, or anything that was done with regard to it, upon which the court could base

a ruling, and that no ruling was made by the Court, or exception taken thereto by counsel.

Upon the arguments hereinbefore set forth under paragraph III, the Government sumbits that this point is not properly before this court for review.

Furthermore, if there was any error in what transpired with regard to the block of iron, it was cured by the instruction of the court which appears near the bottom of page 312 of the Transcript, and which is as follows:

> "You are not to consider any testimony or exhibits or matters or things exhibited to you during the trial, unless the same were admitted in evidence by the Court and you are not permitted to allow yourselves to be influenced by anything in this case outside of the testimony, evidence and exhibits which have been actually admitted, and are in evidence. In other words, you must try this case and determine the guilt or innocence of these defendants solely and exclusively upon the testimony, evidence and exhibits introduced in this case, and nothing outside of that."

VI.

THERE WAS NO ERROR IN PERMITTING EVIDENCE TO GO TO THE JURY OF AN ATTEMPTED PASSING OF A $5 COUNTERFEIT GOLD COIN BY THE PLAINTIFF IN ERROR YORK ON DAVID M. BOYLE SIX

MONTHS PRIOR TO THE DATE WHEN THE CONSPIRACY IS ALLEGED TO HAVE BEEN FORMED.

The law is too well settled to justify citation of authorities that other acts than those set up in the indictment, and which happened prior to the offense charged, can be proved to show intent or guilty knowledge, and that an act six months prior to the offense charged, is not too remote.

The trial judge correctly laid down the law and limited the effect of the testimony with regard to the attempted passing on David M. Boyle when on pages 52 and 53 of the Transcript, he said:

> "* * * but it is always competent, isn't it, in cases of this kind for the purpose of showing guilty knowledge, to show other contemporaneous acts or acts not too remote? I do not see any reason why a different rule would prevail. It is essential here for the government to show guilty knowledge on the part of these defendants in the passing of these various coins. * * * It might well be said that they would have to have these coins or have some knowledge where to get these coins, before they could conspire. But that is not the purpose of the admission of this testimony. It is simply to show, if it does show, that the latter acts were done with knowledge of the character of the coins. The objection will be overruled and the testimony limited to that purpose."

The testimony with regard to the articles found in the basement at 4405 West Street was likewise introduced, and properly so, for the purpose of showing intent and guilty knowledge with regard to the passing of the counterfeit coins.

VII.

NO ERROR WAS COMMITTED IN ADMITTING IN EVIDENCE THE TWENTY-SEVEN COUNTERFEIT FIVE DOLLAR COINS FOUND IN THE REAR OF LONGERS SALOON IN STOCKTON, CALIFORNIA, ON JULY 9TH, 1915.

The testimony of J. T. McKenzie appearing at pages 34, 39, and 40 of the Transcript, when taken in connection with the fact that York and Karr went to Stockton together, were seen together there, and that York was in the saloon when the attempt was made by Karr to pass the counterfeit $5 coin on Eickhoff, is amply sufficient to justify the admission in evidence of the twenty-seven counterfeit coins found in the flush box of the toilet in Longers' Saloon.

At the middle of page 34 of the Transcript, McKenzie said, referring to York,

> "Yes, I could see him all the way to the back of the saloon, to the entrance of the toilet."

At page 39, McKenzie testified that he saw York go into Longers' Saloon and at page 40 McKenzie

testified that the plaintiffs in error had told him that they noticed the fellows watching them and wanted to get out of the way.

It is a perfectly reasonable presumption that York who, according to the theory of the prosecution was carrying the stock of counterfeits, should want to get rid of them, after Karr had had trouble in passing one and parties were observed watching them. He went into the saloon to get rid of this damaging evidence, and he did so.

In view of the fact that a motion to view the premises is directed to the discretion of the trial judge, I do not think counsel is seriously urging his exception to the denial by the trial judge of the motion to view the premises at 4405 West Street, Oakland, which point is covered by paragraph VII of counsel's brief.

Paragraphs VIII and IX of counsel's brief were directed to the refusal of the trial court to give requested instructions numbers 8 and 27. The points therein are fully covered by the instructions given by the court, and there was no occasion for the instructions requested by counsel.

Respectfully submitted,

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M. A. THOMAS,
Asst. U. S. Attorney.

Attorneys for defendant in error.